UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CONVERGEN ENERGY LLC, et al.,

Plaintiffs,

v. 20 CV 3746 (LJL)
Telephone Conference

STEVEN J. BROOKS, et al.,

Defendants.

----------x

New York, N.Y.
September 10, 2020
4:03 p.m.

Before:

HON. LEWIS J. LIMAN,

District Judge

APPEARANCES VIA TELEPHONE

SEIDEN LAW GROUP, LLP
Attorneys for Plaintiffs
BY: MICHAEL STOLPER
DOV B. GOLD
JACOB NACHMANI

VON BRIESEN & ROPER S.C.
Attorneys for Defendants Convergen Energy Wisconsin LLC, Theodore John Hansen and Brian R. Mikkelson
BY: BENJAMIN LaFROMBOIS

KOHNER, MANN & KAILAS S.C.
Attorneys for Defendants Steven J. Brooks, Gregory Merle, Nianticvista Energy LLC and Riverview Energy Corporation.
BY: RYAN M. BILLINGS

(The Court and all parties appearing telephonically)

THE COURT: Good afternoon, this is Judge Liman, I'm here with the court reporter on the Convergen matter.

Matt, will you take appearances?

LAW CLERK: Yes. I believe we're waiting for one counsel, Judge, Vincent Filardo on behalf of Chipper Investments and a few other defendants. I don't believe he is on the line yet.

THE COURT: Well, it is 4:03 p.m. and this was called for 4 o'clock, so we're going to get started.

Why don't we start with whoever is on the phone.

LAW CLERK: Yes. So can I have plaintiffs please state your appearance first for the court reporter?

MR. STOLPER: Sure, this is Michael Stolper on behalf of plaintiffs. Two of my colleagues are on the call but won't be speaking, Dov Gold and Jake Nachmani.

THE COURT: Good afternoon, Mr. Stolper.

MR. STOLPER: Good afternoon, your Honor.

LAW CLERK: And for defendants, for the movant and Mr. Brooks, starting with Mr. Billings, please state your appearance.

MR. BILLINGS: Good afternoon, your Honor, this is Ryan Billings for defendant Steven Brooks, Greg Merle, NianticVistaEnergy, LLC and Riverview Energy Corporation.

THE COURT: Good afternoon, Mr. Billings.

LAW CLERK: Next for Convergen and other defendants?

MR. LaFROMBOIS: This is attorney Ben LaFrombois for defendant Convergen Energy Wisconsin, Ted Hansen and Brian Mikkelson.

THE COURT: Good afternoon, Mr. LaFrombois.

Do we have any other counsel for defendants on the phone?

All right. Very well. So we'll get started. I've got a series of motions in front of me, including the motion for a motion preliminary injunction and the motion to dismiss in favor of arbitration, which I construed to be in the alternative a motion to compel arbitration. I also have in front of me a motion by the Spanish defendants to dismiss, I have got a motion for reconsideration, and I may have additional motions, but I think those are the principal ones.

What I would like to do today is I'm going to give each plaintiff and defendants about half an hour. You can spend it however you want, but what I would like to rule on quickly and would like to hear argument on is the motion for a preliminary injunction and the motion to dismiss in favor of arbitration. Spend the time however you want.

We'll start with you, Mr. Stolper. The first thing, though, that I would like to do is just to confirm with you, Mr. Stolper, a couple of things, and I will confirm with defense counsel.

First of all, can you just lay out for me the declarations and the evidence that you are relying upon for your motion for preliminary injunction?

MR. STOLPER: Sure. This is Michael Stolper on behalf of plaintiff, your Honor.

We're relying on two client declarations, and we are relying on one declaration from our computer forensic consultant. His name is Aaron Weiss. And we also have put in a declaration from my colleague at our law firm, Dov Gold, who is on the phone, to put in documents that are lawyer related, so to speak. So those are the declarations and their exhibits that we're relying on for the injunction.

THE COURT: And the two clients are Camilo Patrignani, is that correct, and Phaedra Chrousos?

MR. STOLPER: Yes, it's Camilo Patrignani, and I refer to him as Camilo since that's easier than trying to pronounce his last name, and his colleague and my client is Phaedra Chrousos. I also refer to her as Phaedra just because that's easier than Chrousos.

THE COURT: Okay. And do you consent to me adjudicating the motion for the preliminary injunction on the basis of the declarations that I have in front of me without any live testimony or cross-examination, and with today being limited to oral argument which I'm hearing remotely?

MR. STOLPER: I appreciate the opportunity that you

have given us today. I know it's never easy for all involved, particularly the Court, to deal with an application like this by phone. You probably saw that there were just two rounds of briefing. We put in our brief and our supporting declarations and the other side put in their declarations and their brief. We didn't reply because we didn't have an opportunity to reply, which is fine, except that they do raise technical issues in their opposition, and we do have feedback from Aaron Weiss, our technical consultant, and also from our chief information officer of the client, we have feedback from him and also have some feedback from our client.

So I think that if you were to rule today, it would be incumbent upon me to try to articulate the issues that they have raised with the papers that we received. And I'm going to admit to you, your Honor, that -- I could express it, but if you're asking me to consent, I would say I was hopeful that the better course of action would be to put some witnesses in front of you. And if you were not so inclined, then the alternative to that is to take some depositions of those who put up declarations so that we have a chance to cross-examine them on what they have said. Because as I say, the things that have been put in front of you, a number of the statements that were put in front of you are incredible, and it shouldn't be that hard to demonstrate the lack of credibility on some of those statements, and I would welcome the opportunity to do that.

THE COURT: Okay. Well, this is the way we're going to handle it then: I'm going to turn to defense counsel and ask similar questions, but I'm going to consider your motion for a preliminary injunction on the basis of the evidence that you have presented and we'll see whether on the basis of that evidence you've satisfied the requisite standards for a preliminary injunction. I hear what you're saying in terms of the defendant's evidence and the opportunity to rebut that, and to the extent that any decision that I would make would be based upon what the defendants are offering. You can make a proffer to me as to the evidence that you would submit in response.

Let me ask defense counsel, who is going to be speaking with respect to the preliminary injunction on the defense side?

MR. BILLINGS: Your Honor, this is Ryan Billings. Mr. LaFrombois and I are going to split on discrete issues. We represent different clients. I think Mr. LaFrombois will primarily address what Convergen Wisconsin has been doing, and I will address some of the larger issues, such as arbitration. And the declarations that we're offering are my declaration, the declaration of Steven Brooks, the declaration of Michael Knechtel, and the declaration of Mr. Swaminathan. We call him Vaidhy because, again, we have difficulties pronouncing his last name. And also there were some contracts that were put in

in connection with our motion to dismiss, 92, I think it's 1 through 24, we intend to rely on those as well.

THE COURT: Do you object to me adjudicating the issue of preliminary injunction on the papers, limiting it today to argument?

MR. BILLINGS: I do not.

THE COURT: All right. Very well. We'll start with you, Mr. Stolper. I would advise you also to spend your time on the trade secrets and the motion to compel arbitration issues. I'm, quite frankly, less interested in the discovery issues.

MR. STOLPER: Okay. I will start with the injunction and then I'll address any questions you may have on the injunction and then we could segue over to the motion to dismiss, if that's all right with your Honor.

THE COURT: That's fine.

MR. STOLPER: So on the injunction, we have pointed out in our papers that we have been able to narrow down the scope of the injunction that we seek from the initial application due in large part to the work we were able to achieve with Mr. LaFrombois, distinct from Mr. Billings, but Mr. LaFrombois, who represents Convergen Energy Wisconsin or CEW, we were able to -- only recently, but we did receive a number of the emails that we were asking for, and we were able to resolve a lot of the email issues which implicated hacking

and concerns about some future cyber attacks. Nevertheless, we still seek an injunction.

And to answer the question you posed earlier, I think that the papers that we put in certainly establish the grounds for an injunction moving forward. And that's basically because under our trade secret claim and talking about misappropriation, the defendants admit they're still in possession of our trade secrets, and there's still the possibility that our trade secrets are with third parties that we don't have discovery from. We don't know who they are. And that's because what we have discovered -- we've only been given from Mr. Billings, we've gotten our company laptop back, but again you have seen the declarations on that front. What we got back we got back certainly late in the game, and a lot happened to that laptop before it was handed over to Mr. Billings who then coordinated a forensic copy of that laptop to be made. But one of the things that we discovered with that laptop is that hard drives were accessed, cloud-based applications were accessed with that laptop. So we don't know to what extent our information, our non-public information, has been disseminated.

Now they gave us interrogatory answers to identify who they tell us they gave it to, but I think your Honor will appreciate the fact that we're not going to take only their word for what they say, in particular Mr. Brooks, because we

have been given -- we've got evidence in front of us, not just allegations, that Mr. Brooks has not been honest in this process, both before the litigation and during the litigation.

I just want to highlight a couple of things from our papers. You have them. In our fraud claim we start with the fact that Mr. Brooks didn't tell his employer or anybody at the company that he was on both sides of this deal.

THE COURT: Let me interrupt you for a second, Mr. Stolper, and just ask you about the trade secret issue and the irreparable harm issue. I'm looking at paragraph 27 of the Chrousos declaration which addresses irreparable harm. You might want to pull that up.

MR. STOLPER: I'm doing that.

Got it. You said paragraph 27?

THE COURT: 27.

MR. STOLPER: Okay.

THE COURT: And that makes several assertions. The first assertion is that the defendants are depriving Convergen of the ability to protect its own data, especially from unknown hackers. With respect to that assertion, what evidence have you put in front of me that would indicate that if I do not grant this injunction there is a real, immediate, and substantial risk that the data that is in the possession of the defendants will be hacked by unknown hackers, or put another way, that the defendants will not protect your data?

MR. STOLPER: The hacking concern, as I indicated early on -- the hacking that we know about happened with respect to the Latvian emails, and I believe that issue has been put to bed. So when I said that we narrowed down our injunction application, that was with respect to hacking with what they had.

But your question actually is interesting in that there is still the risk that the files that they have, that are not in the possession of their lawyers but they still have, could be hacked. But our application is no longer predicated on that sentence, on that concern about hacking.

THE COURT: So the next sentence then goes on to say: Defendants are unlawfully granting themselves continued access to plaintiffs' proprietary and confidential information and trade secrets. Is there any evidence in front of me that would indicate that there is a risk that the defendants will exploit the trade secrets or confidential proprietary information in the interim between now and a final resolution to the detriment of your clients?

MR. STOLPER: Yes, your Honor. I will start with the Aaron Weiss declaration, which really goes unresponded to on this point. That's our forensic consultant. What he put in his declaration is that he's identified 4,100 documents that were copied -- or 4,150 I believe is the right number. He identified that many documents of ours that have been copied

and may have been uploaded to cloud-based applications of Mr. Brooks that we have not been given access to, and their declarations don't discuss making forensic copies or taking any prophylactic steps with respect to what Mr. Brooks has in the cloud.

So these are plaintiff files that we identified, that Mr. Weiss identified from emails, and then I will go with the first name, Camilo, he also identifies in his declaration his understanding based on file names things that were copied, things that were deleted. So these are files that have nothing to do with the pellet business that was acquired now we saw fraudulently, but the pellet business is what was acquired.

But the information that's in front of you identifies strategic planning documents and valuations of other businesses unrelated to the pellet business or the power plant business, but also including the power plant business, which they didn't buy. So there are copies of documents that have nothing to do with the pellet plant that were made after Mr. Brooks was terminated and no longer affiliated with us in any way.

THE COURT: Right. But my question on this point is: What evidence have you put in front of me that the defendants will exploit that information to your clients' detriment? They may have it, at the end of the day you may get it back, depending on who owns it. They may retain it. But in the interim, what evidence is there that they will use it in a way

that hurts your client that cannot be compensated by money damages?

MR. STOLPER: Well, two things. One, the mere act of copying it is indicative of use, and we cite to case law that says what you're to infer from unlawfully copying files. But we also put in both of our client declarations from Phaedra and Camilo that those files are highly sensitive, took millions of dollars of investment over the years to generate, and if they were to use them would be irreparable because it has to go with competitive information about valuations of businesses, businesses plural. So that's laid out in both declarations.

The irreparable harm here, how do I quantify monetary damages for unlawful access to our proprietary information? It's Black letter law. Access to that and use of that information is worthy of an injunction and leads to irreparable harm. You can't measure the damage of stealing our internal information, particularly in this case where they have information from the power plant which they're now suing over a business relationship that they have with that entity. So now they have information from an entity that they say they're in contract with. This is a textbook case of irreparable harm and when an injunction should be issued. That, to me, is the easiest of the issues that's been put in front of you.

THE COURT: All right. Let's keep walking through this. The next sentence in paragraph 27 is, "Defendants are

denying Convergen access to the email files of the pellet plant prior to the sale, which is, as stated above, needed for future compliance requirements." Is that still the case, that you don't have access to the email files of the pellet plant prior to sale?

MR. STOLPER: Well, that's an open question, your Honor, and that is under review because we were handed -- they put in their declaration that they identified 248,000 emails that we were seeking, so that would fit into this category, and they provided us with 48,000 or 42,000 of that number, and that was given to us later on at the very end of August. So we're in the process of reviewing that.

We had agreed with Mr. LaFrombois as to the three categories that the emails would fit into, and he, on his end, went through and allocated the documents that he said into those three buckets. We have to review that to see what it was that we were given and the like. We still have a debate. But what we did reach an agreement over is whether we are entitled to Convergen Energy Wisconsin files, not just trade secrets of non-Convergen Energy Wisconsin companies that were resident in those files but the files of Convergen Energy Wisconsin. Those files that we need for regulatory and accounting purposes that existed prior to the sale, they have objected to providing us with those, so we do have a debate over that.

In terms of the injunction, they say that they have

identified our trade secrets and proprietary information. Again, they unilaterally determined that. We now need to vet that. That's going to take a little bit of time. So the short answer to the question is: It's an open issue, it's not resolved, but it's not something that we ask you to rule on today because we don't know what they have done.

THE COURT: Okay. Last question I've got with respect to the trade secrets, there may be others that come to mind, but there's a contract here that has some pretty broad language in terms of what your client sold the defendants. It includes trade secrets that are not used by the pellet plant but may be owned by the pellet plant or previously by CEW. What evidence have you given me that the trade secrets and the assets that we're talking about actually belong to you as opposed to the defendants?

MR. STOLPER: Well, I'm glad you asked that question because that is one area that I believe we resolved, and Mr. LaFrombois can confirm that when he has a chance to speak. I believe we resolved that because we are not seeking any trade secrets that belong to the pellet plant, at least not at this point in time. If there's the secret formula on how to make a pellet, that was one of the buckets that he was able to put emails in other documents, perhaps attachments to emails, and segregate those out and not produce them to us under the identity of trade secrets that belong to CEW.

THE COURT: So what specifically do you know of now that the defendant has that has not been returned to you and that they are improperly retaining specifically? Because my injunction, if I were to grant one, has to be specific.

MR. STOLPER: Well, we know that they have -- they're not denying it, they have our files on certain hardware, phones, computers. They claim they have been copied. But as in the case of Mr. Brooks' laptop, the only one that we've been given access to, information that was on that laptop made its way electronically out of the laptop and into the cloud and elsewhere, into an external hard drive, and so our information is resident on those pieces of equipment.

What they're saying in their papers to you is they're now in the hands of their lawyers and they have been copied, date uncertain, and so there won't be any further use. But as we point out, as I'm saying now, in the case of the laptop that we do have, we do know that that information, prior to being given to Mr. Brooks' lawyer on June 2nd, a lot happened to that laptop, including deletions and copying to the external hard drive and the cloud.

And as Mr. Weiss points out in his declaration, there are a number of files that have our name on them that are proprietary to my client. So very specifically we know that those files were copied and we can't tell you where they are. But the point they make on this issue of being very specific,

one of the points that they make that the defendants put in their opposition to the injunction is that the burden is on the plaintiffs to identify specifically what they stole, and there's no case law that shifts that burden to us. We know that they had our servers. We know that they have the servers and email account.

THE COURT: You gave them your servers. Of course you know that. You gave them to them. You say that the transaction was fraudulent, but I've got some separate questions about that. Assume that the transaction was not fraudulent, they didn't steal your servers.

MR. STOLPER: No, your Honor, they did, because let's nuance that. There's the pellet plant, right, so let's assume this was an honest transaction, there was the pellet plant, but they had the files of a Latvian entity, they had the files of the power plant that is now on the opposite side of the business arm in deals. They kept that. And the problem here is that the very people that were working for us that were tasked with making sure that our information was protected are -- well, one of them is on the phone, Mr. Hansen, Brian Mikkelson, another defendant, and Steve Brooks.

And just to your point, they have cited to the amended closing statement. I'm sure that's going to come up when we talk about the motion to dismiss. They cited to that document. In that document, one of the provisions in there is that we

asked to have Brian Mikkelson serve as a consultant to help run these businesses during the transition period because we thought he was on our side. We thought he was an honest broker. We had no idea that he was working with them, that he was supporting this fraud. We didn't know that then. We only learned that as the investigation proceeded, and we didn't get to file our complaint until May.

So the very people, these three individuals who are now individual defendants in the case, were the very people that were tasked with this. If this were an honest deal, that information would have been segregated off those servers. But there's not a piece of paper that says as part of the sale we gave them the Latvian entity's information, the power plant information or Convergen Energy, the parent of Convergen Energy Wisconsin, we never gave them those files. Those were supposed to be segregated. The problem was the fox was guarding the henhouse, and that's how they ended up with it.

THE COURT: Besides the fox guarding the henhouse, assuming that I reject that assertion, isn't it correct that the files that you're talking about were on the servers that were handed over? Assume that I conclude that this was not a fraudulent transaction whatsoever, what argument do you have?

MR. STOLPER: Well, if it's not fraud then you're saying that you have to conclude that there were no material misrepresentations and that there were no material omissions as

to what happened here. And in our complaint we refer to a recorded admission by Mr. Brooks. In his declaration to you here he says that he's not getting into the merits of the case, but then he goes on to talk about how he thought he resolved everything by paying us a million dollars in a document that doesn't have a release or anything like that.

But he doesn't deny what you just said, he doesn't deny the basic allegations of this case, that there were insiders that self dealt themselves, the pellet plant, and the very people that were supposed to segregate that -- there's no one else here to hey, make sure that when you sell those servers -- and everything is based in Wisconsin because that's how we ran all of these entities and they're all related -- that as part of the sale you must claw them back. We were paying Hansen and we were paying Mikkelson post-closing to handle these things for us because we thought they were loyal to us.

THE COURT: Let me ask you another question, Mr. Stolper. Do you dispute that Mr. Andueza had the corporate authority to sign a transaction of the magnitude of this transaction, that he had the corporate authority to sign?

MR. STOLPER: Yes, your Honor. That's the subject of our amended complaint and that's the subject of our motion for reconsideration. We pointed out in those papers that it was also in the record that we referred to him as our

co-conspirator, and that the defendants have also taken issue with Mr. Andueza. And Mr. Brooks in his own declaration to you in this case in opposition to the injunction says this whole fraudulent scheme was Andueza.

THE COURT: But let's just assume hypothetically that it is in the seller's interest that the buyer get financing, and that one way that the buyer can get financing is to get it from somebody who was with the seller. That's not an unusual transaction, right? That happens all the time. Is there anything per se wrongful about that as long as the seller knows?

MR. STOLPER: Well, there's two parts to that. The seller has to know, but you also have to disclose that you have an interest in this transaction, not only on the seller's side in trying to sell something, but also on the buy side. And there's no denial that they didn't tell anybody, and we allege they didn't tell anybody.

THE COURT: But did they tell Andueza?

MR. STOLPER: Andueza was part it. He's part of the adverse interest exception. That's what we cite to. You can't hold -- Andueza can't bind the company because he's compromised. And that goes back to the 1800s and the case law that we cited. He is compromised of what he does. You cannot repute his conduct or knowledge to the company. And at the same time you've got Brooks saying: I'm innocent, it's this

other guy, Andueza did it all. But now in this situation they are sort of taking the intellectual side of the position and suggesting to you that Andueza had the authority to sign it, yet he's compromised.

THE COURT: So who is it that you're saying at the seller would have had the authority to permit Brooks to invest on the other side of the transaction?

MR. STOLPER: Any one of senior managers, if the company had known.

THE COURT: No, which individual? Companies are comprised of individuals. Which individual at the company would have had the authority to permit Brooks to invest on the other side of the transaction?

MR. STOLPER: George Logothetis is the chairman of the company. He would have been the one. He was the one that Brooks pitched this deal to and Brooks failed to tell him that he had an interest in this. And he failed to tell us that his longtime friend, Greg Merle, was actually a friend. He introduced him as a third party, arm's length business deal. That's in our complaint, and also I believe in the -- I'm sorry, Judge, I don't remember if it's the Phaedra declaration or the Camilo declaration. There have been too many briefs in a short period of time. But it's in front of you that Brooks -- that the fraud here was both by misrepresentation and by omission and it was not telling the company.

THE COURT: Is there evidence that you've given me that the buyer did not know that Andueza lacked the requisite authority and that permission for Brooks to invest on the other side would have to come from -- is it Mr. Logothetis, what's his name?

MR. STOLPER: Logothetis. Sorry, Judge, there are a lot of tough names in this case on both sides of the aisle. Yes, trying to think, it's in our complaint. That's what we allege in our complaint.

THE COURT: But the complaint is not evidence.

MR. STOLPER: No, I'm going through the check list of what is in front of you. We have a declaration from Andueza that goes to that point. Trying to think what else. For some reason I'm drawing a blank, your Honor, but there's certainly other evidence.

But we're talking about -- here the injunction, we're talking about really principally the individual defendants. As you say, companies act through people, talking about Hansen, Mikkelson and Brooks, and they certainly were the ones who were orchestrating this and they were the ones who were keeping the secret from their bosses, from Logothetis and the other executives at the company.

And those people are tied to CEW and themselves, and that's who the injunction is geared towards. And that's what you're asking me now, not in the context of the motion to

dismiss but on likelihood of success in the context of an injunction you're asking for evidence. And those three, those three, they knew, because they participated in this.

And we put in an email, in terms of Mikkelson and Hansen, they knew that Brooks was soliciting money from the Spanish defendants back in the fall, in November I want to say, of 2019, and none of them disclosed any of this to anybody at this company. In fact, Brooks was operating through his personal email and was communicating with the other individuals through his personal email. We only have a few examples of that because we haven't been given access to their personal emails. That's one of the discovery issues that we have.

THE COURT: Okay. What else do you have?

MR. STOLPER: Well, I'll talk about the motion to dismiss because I think -- looking through my notes, I think that we touched on the documents, and the concern that I mentioned about the injunction, the types of things that are in the declaration, the type of documents, there's client contracts, market analysis, investor lists, strategic discussions, these are not things that were sold. And these are things that were unrelated to the company that they have no business having, and there's absolutely no justification for it. And we cite to case after case that, in these circumstances, grant injunctions.

On the motion to dismiss we really run into some of

the same issues that the Court addressed in the stay of the arbitration motion, and that's the issue of contract formation versus inducement. And what we've stated, your Honor, in our motion for reconsideration and in the amended complaint and in these papers here in opposition to the motion to dismiss is that our position is that this is a formation issue, that we never get to the terms of the contract because of what I said about Andueza.

And they knew, the defendants knew that Andueza was compromised because he was a co-conspirator. Now Brooks is now telling you in his declaration that it was really Andueza who was the kingpin here. And he doesn't go so far as to say he was innocent, but he says that Andueza was the one who raised the money and was the one who was behind the whole sale and the whole keeping it a secret.

And as I said a few minutes ago, in that role, Andueza can't bind the company. And frankly, the only person who could have at that point would have been George Logothetis, the chairman, who they all reported to. So we fall within the exception of *Buckeye*. You cite to the *Buckeye* case in your decision, and we do fall into that exception, that when there's an issue about authorization, it goes to formation. And that's an issue for the Court to decide, it's not an issue for the arbitrator to decide. This isn't an inducement case, these are contracts that are permeated by fraud.

We never had a clear chance to decide whether we wanted to be in it, to do this deal or not, because the very people who were tasked with making it happen, Brooks, Hansen, Mikkelson and Andueza, were compromised.

THE COURT: So let me ask you a question on contract formation, and maybe it's easiest to do this through focusing on the supply agreement. Is it your position that the pellet plant could simply say to you there's no contract, you've got no right to pellets, this contract is a nullity?

MR. STOLPER: You're asking if the pellet plant has the right to say that to us now?

THE COURT: Yes.

MR. STOLPER: Yes, that contract is not binding or enforceable. We never treated it as binding or enforceable. And that's part of what is in the Camilo declaration to you, and that is we never bought under that contract.

THE COURT: So your proposition is that if the pellet plant had said to you, "Listen, there's no contract here, no supply agreement contract," they would be perfectly within their rights to do so and to cut you off entirely?

MR. STOLPER: 100 percent. 100 percent. That is not an issue.

THE COURT: That has to be what you're saying, right?

MR. STOLPER: Exactly.

THE COURT: Because you're saying this is a

meaningless piece of paper. So if I find, for example, that the acquisition agreement was not fraudulent, your position would be the pellet plant can still walk away from this transaction.

MR. STOLPER: Because the supply agreement would be fraudulent but the acquisition agreement would not be.

Look, our position pretty straightforward. The supply agreement is not binding on anyone, the acquisition agreement is not binding on anyone. There was fraud in the formation and we are adjudicating our rights based on that right now. And you had indicated in the stay decision, in denying the stay you had made reference to fact that we were buying pellets under the supply agreement.

And I think the defendants may have confused the record here, and we attempted to clean it up in our motion for reconsideration, but I could state it very simply now. Just as I said a few minutes ago, the very people that were running the pellet plant and the power plant in the period of time after the closing while we are investigating the fraud and trying to figure out what happened here are Hansen and Mikkelson. They're now defendants in this case. When we figured out whose side they were on, what they had done, we put them on the other side of the V and named them in this lawsuit. But there was a period of months in which they were still operating, and while they were doing that they were buying pellets. And what Camilo

says in his declaration is that they were having the power plant buy more pellets than the power plant could use legally because it would be an environmental violation for them to have used the amount of pellets, the volume of pellets they were using, and aside from the fact that the price terms were inflated and not consistent with market.

But that was being done by the defendants, and as soon as we, the plaintiffs, were able to figure out that they were compromised, we fired them, took it over, stopped paying for the pellets because we now realized they owed us money, and certainly didn't take any orders anywhere near the requirement that -- the minimum requirements that the supply agreement had. So we never ratified that supply agreement, never, as the record in front of you shows.

THE COURT: Let me hear from your adversary. Thank you.

MR. BILLINGS: Thank you, your Honor, this is Ryan Billings. And I know that Mr. LaFrombois would like to be heard, especially about the supply agreement and what's happened on the Convergen side. So I will try to do my part in half the time that Mr. Stolper took. I'm happy to answer any questions or address any concerns that the Court has, but I have kind of a logical priority of analysis that I think might be helpful.

THE COURT: Okay.

MR. BILLINGS: So in the motion to dismiss, there's a lot to chew on there, a lot of different arguments kind of in levels, and I don't want to waste of the Court's time talking about level five when we don't get past level one, which is arbitration, which your Honor asked us to address. So I would like to focus my arguments on that, but if you have any questions about the others, please do.

THE COURT: Between the two of you, who is going to be addressing the question of irreparable harm in the preliminary injunction?

MR. BILLINGS: Either of us could. We have different clients who have different windows into this, but I think either of us could talk about that issue.

THE COURT: Well, let me be specific. I would like to hear what the defendants have to say about the plaintiffs' claim that the intellectual property in the possession of the defendants belongs to the plaintiff and should be returned to the plaintiff pending a final resolution of this matter, whether it be in an arbitration or in a court proceeding.

MR. LaFROMBOIS: Your Hour, this is Attorney LaFrombois. If Attorney Billings could address the issue of what Mr. Brooks had in his possession and I can address the issues of what Convergen had in its possession or has in its possession that might be helpful to the Court, because that's how we prepared for today's hearing.

THE COURT: Mr. Billings, why don't you address that question first and then I will turn to Mr. LaFrombois and then I will hear from you on the motion to compel.

MR. BILLINGS: Okay. So there are three devices, work devices or information storing devices, that Mr. Brooks had and no longer has. One is the laptop, the HP. I allowed Aaron Weiss, plaintiffs' forensic expert, to take charge of the computer and make a copy. I sent it to him. He got it back in June. That computer is in the possession of Digital Intelligence, our outside consultants. Neither I nor Mr. Brooks have access to it.

The second device is the iPhone 8 that Mr. Brooks used for work. That device has been forensically imaged. It has not been in use since I got it and answered some questions that plaintiffs had for me about it. It was then powered down. Digital Intelligence has a copy, I have the original. It has been off since I believe July 6.

Third is the external hard drive on which information was copied. And that's discussed in Mr. Brooks' declaration, Mr. Knechtel's declaration, and Mr. Swaminathan's declaration.

What Mr. Brooks had asked back in February -- very different context, but back in February he wanted a copy of his emails and his personal files on that hard drive. So he gave it to a friend who knew more about technology than Mr. Brooks did, the friend was able to copy the files that were on the

desktop of the computer but not the emails because of the way Libra had set up that computer. The files that went onto the external hard drive were never accessed by Mr. Brooks. Mr. Swaminathan explains in his declaration that he could prove forensically that Mr. Brooks never looked at it. That external drive is now in the exclusive possession of Digital Intelligence. Mr. Brooks does not have the access to it.

THE COURT: So the bottom line, Mr. Billings, is that Mr. Brooks is no longer in possession of any of the plaintiffs' alleged trade secrets. Is that your bottom line?

MR. BILLINGS: Correct. That is my bottom line.

THE COURT: Go ahead.

MR. BILLINGS: I want to correct one issue that Mr. Stolper said that is not correct. So Mr. Weiss says that information was copied onto the external drive. He does not ever suggest or say that anything went into the One Drive. That's not there. He says that the laptop was synced with the One Drive, but unless Mr. Knechtel had the password, which he didn't, he couldn't even have logged on. And Mr. Brooks says that he has not accessed anything on One Drive and will not pursuant to order of this Court. So I wanted to correct that, but yes, that's the bottom line.

THE COURT: All right. Mr. LaFrombois, why don't you address it from the buyer's perspective. What information does your client have that the plaintiff alleges belongs to him?

MR. LaFROMBOIS: We have the Convergen Energy in an Office 365 account which had the email for the company running through it. The email was on a separate server and was not ever in the possession of Convergen. So Libra, on August 17 -- Mr. Stolper indicated the end of August we provided them these approximately 48,000 emails, we provided that to them on August 17. So we took all the emails that we believe reasonably would be appropriately in Libra's possession. We do not desire to have possession of it. It's under review on their part. We have other categories of emails that we believe do not contain any other categories of Libra trade secret information. So we do have some, but this has been protected and we're following the order to preserve and protect this data. There's no evidence that it's at risk of being disclosed to third parties.

We have two hard drives that were owned by CEW at the time of the transaction used by Mikkelson and Hansen. Those have been preserved by our third-party expert and that third-party expert retains those hard drives. They have been ghosted, I'm not sure the technical term, but they have been -- the entire drive has been preserved.

Those are the two outstanding areas. As noted, we worked through the Latvian emails to know they're off of our system entirely, which we're pleased to have that information. So your Honor, it would only be emails on the Office 365

account held in the normal course, and of course they have been backed up and preserved.

THE COURT: Let me ask you this question and also ask Mr. Billings a similar question. With respect to the information that is held in the possession of a third party, the consultants, is there -- I guess I could ask the question two ways. One is: Is there any restriction that is currently in place that would prevent that consultant from turning it over to your client to exploit? And is there any reason why an injunction should not issue pending arbitration or a trial on the merits that would keep whatever is in the possession of the consultant in the possession of that consultant?

MR. LaFROMBOIS: Your Honor, we would agree that on our side that our consultant would hold that drive and not be directed to disclose that information. Some of that information may still reside on their work laptops. The definitions here have been pretty broad and have not been narrowed. But unless I would instruct Mr. Miller to send that hard drive for those inappropriate purposes, I do not believe that that would happen. He's not under the direction of Mr. Hansen or Mr. Mikkelson, he would be under my direction to release that hard drive.

THE COURT: Mr. Billings, same question with respect to the information in the possession of your consultants.

MR. BILLINGS: So I have given my consultants both the

Court's protective order and the TRO. They are forensic professionals. They understand the norms and expectations of this industry.

In addition, the HP is encrypted. There's a password that I don't have, that Mr. Brooks doesn't have, that only Digital Intelligence has. And they set it up so there were abilities to access it. I assume it's a pretty long key that can't be easily copied elsewhere. So not only do they have it, but even if they gave it to me today or gave it to Mr. Brooks, we couldn't access what's on it because of the encryption. And my instructions to them are: You maintain possession of this so there's no issue of anybody on the defendants' side having possession of anything that putatively belongs to Libra.

THE COURT: Mr. Stolper, why doesn't that give you all of the protection that you would be entitled to pending a resolution on the merits?

MR. STOLPER: Your Honor, our concern is not with consultants. I don't have a concern with the consultants. We have a concern with what is not with the consultants. So you have in front of you, you've got -- in the Aaron Weiss declaration you have files, our files, plaintiffs' files, that have nothing to do with the pellet plant, being uploaded into the cloud. And there were files uploaded into the One Drive account; and they didn't come from the laptop, they came from another source.

So what you know, what have in front of you in your record, you know that Mr. Brooks could have emailed him and put in front of you the attachment to the Phaedra declaration. She asked for it in February, she asked for the hard drive, and he tells her they're in an apartment in New York City.

THE COURT: You know what, you're wasting your breath on the allegations with respect to Mr. Brooks. Unless you've got some facts that you can give me that would undermine the affidavits and explain to me why you -- well, unless you've got some facts that would undermine Mr. Brooks' affidavit and the affidavit of his client, you're wasting your breath.

MR. STOLPER: I was getting there, your Honor. We have in front of you emails where he's telling the company that he can't access the information because it's in an apartment in New York City. What he put in front of you is the declaration that said: Oh, no, it was my friend Knechtel, and that all these files that are were copied and deleted and all this extra software that shouldn't be there about copying the -- forensically protecting what people could see, that was all his friend, not him.

THE COURT: What else do you have?

MR. STOLPER: Our files are in the cloud. They haven't given them to us and they're not saying anything to you about our files that are in the cloud. I don't care about what is with the consultant, but you have evidence in front of you

that our files went to Drop Box, went to Office 365, went to a number of places that they haven't given access to and they haven't said anything about them, and that's the issue with Brooks.

In terms of CEW, it's the same thing. They don't tell you the date that these copies of their hardware were made. We don't know what copies of our files were made. All three were caught, and while they were caught, before they gave any of their equipment to their lawyers, we know that with Brooks, copies and things were deleted, and there's a whole inconsistent story that's being told. That's why I asked for discovery as to that to further flesh it out for you.

THE COURT: Okay. I have heard enough from you, I'm going to turn back to the defendants.

With respect to discovery, I will just say and correct something that I said before, which is I granted you expedited discovery. I also let you set the deadline, the date for the preliminary injunction hearing. So the record should be clear that you did not raise with me, before you scheduled a motion for a preliminary injunction, any issues with respect to discovery.

Let me hear for from defense counsel.

MR. STOLPER: Your Honor, we only learned about these things from the papers they just submitted the other day. We never heard of the name Michael Knechtel before. We never knew

that. Brooks told us his laptop was in the city.

THE COURT: You had every opportunity to do expedited discovery, every opportunity to do expedited discovery. You had every right to call me before scheduling the motion for the preliminary injunction. If you were concerned that there were discovery obligations that had not been satisfied, you didn't do so, and I'm going to rule on the motion for a preliminary injunction on the basis of the evidence I've got in front of me.

Defense counsel can continue.

MR. BILLINGS: Thank you, your Honor, this is Mr. Billings, and I think we've covered irreparable harm. Everything is protected, everything is preserved, Mr. Brooks doesn't even have access to it on my side, and it's a similar situation with respect to Mr. LaFrombois.

I would like to talk briefly about the arbitration issue, which I think is pretty open and shut under the Supreme Court's clear precedent.

So Mr. Stolper claims -- this isn't their briefing, but he told you that only Mr. Logothetis would have authority to sign off on this sale. That's an extraordinary claim given that Mr. Logothetis had no position with any of the companies involved. They were managed by two people, Mr. Andueza and Mr. Diaz, and both of them signed off on this deal multiple times. There's no legitimate formation question.

And I will put back to the plaintiffs the same question this Court asks in your August 5 order with respect to the supply agreement: What happened after the contract was executed? How did the parties perform? Libra didn't ask for its company back. It didn't say: Oh, my gosh, I accidently sold my company, this didn't happen. The sale happened, and the contracts under which it happened are not in dispute. These are the agreements. They're in front of the Court, they are unambiguous, they require arbitration, and under the clear precedent of the Supreme Court, that's what was discussed.

THE COURT: How do you draw the distinction in the *Buckeye Cashing* footnote between an issue that goes to contract formation that is for the Court and a question of fraudulent inducement or the improper exercise of authority that might go to an arbitrator?

MR. BILLINGS: That is a great question, and I think the courts have struggled with it. That's why we keep getting opinions from the Supreme Court on related issues. But I think in this case it is not difficult.

So as your Honor correctly pointed out in your August 5 order, *Buckeye* identified basically three areas in the cases interpreting it under which a Court could step in. So they are whether the agreement was ever actually signed, is the signature valid, whether the signatory had authority and whether the signatory had capacity. So there's no dispute even

raised by plaintiffs that the signatures aren't the actual signatures of the people involved, and there's no question that any of the signers lacked capacity.

The issue they raise is authority. And specifically, they claim that Mr. Andueza was in some sort of conspiracy with Mr. Brooks and therefore he lacks authority to bind Andueza. Now there's no evidence before the Court that there was any such conspiracy. Mr. Brooks doesn't say he was conspiring with Mr. Andueza, what he says is Mr. Andueza asked me to provide funding for this deal. That's what he said. And Mr. Andueza, as the manager of Convergen, had actual authority to make that request under the operating agreement which gives the managers broad authority which expressly waives the duty of loyalty, the duty of undivided loyalty, and provides that these companies are run by managers. The operating agreements further provide that Mr. Andueza's or Mr. Diaz's signature on a document is conclusive evidence that they had authority and bound the company. That's in Section 4.3 of the operating agreement of Convergen Energy, which I believe is ECF 92-19.

Now we have signatures left and right from Mr. Andueza and Mr. Diaz. Mr. Brooks walks through the facts that this was a financed transaction where money from banks changed hands. BMO Harris Bank was monitoring this and making sure that everything -- every I was dotted and every T was crossed. And signatures were put in escrow, they were released by Mr. Diaz

February 3rd and after they admit they discovered the alleged fraud. And then 18 days later, Mr. Diaz signed an agreement again. So there are agreements left and right signed by Mr. Andueza and Mr. Diaz. There's no legitimate question of contract formation and there's no legitimate dispute about the fact that the company was sold and it was done so pursuant to these documents.

So I don't think contract formation is a legitimate issue here. It's more a question of they believe the documents should have been different, the sale price should have been higher, the supply agreement price should have been lower, the cost for the services of Mr. Hansen and Mr. Mikkelson should there been lower, the shredder should not have happened. Those are the kinds of arguments they make.

What they're saying is because of an alleged fraud, the contracts have the wrong terms. But that's a hypothetical question. That's a question about what the world should have been. In the real world, these are the contracts, and there's no genuine dispute that these are the documents under which the sale of Convergen Energy was executed multiple times.

So on the question of whether there was a contract formed, that very threshold question, there is no legitimate dispute on the evidence submitted to this Court. There is a legitimate dispute about whether the terms are proper, whether the negotiation was appropriate, and how it all played out, how

we got to that point. But the fact that that is what happened is not a legitimate dispute, at least on the evidence submitted to this Court.

THE COURT: Okay. What else do you have?

MR. BILLINGS: So I think, like I said, there are other levels to our motion to dismiss, but I think the analysis begins and ends with arbitration. I don't think this is an issue where there are two sides, there's only one side. The precedent is unless the Court can say with positive assurance that there is no interpretation of the arbitration clause at issue under which the dispute falls under it, you have to send it to arbitration. It's not one in which the Court has discretion because of the congressional policy in favor of arbitration which has been affirmed continually by the Supreme Court I think three times last year and already this year. It's black and white.

And the only issue that they pointed to late -- I would point out the declaration of Mr. Andueza was submitted last Friday, well past the deadline for preliminary injunction evidence, it was submitted in the context of the Spanish investors' motion to dismiss, not even this motion, but it also doesn't make any difference.

THE COURT: Why not?

MR. BILLINGS: The only issue is arbitration. I could answer questions about the other causes.

THE COURT: But assume that on the motion to compel I should look at Mr. Andueza's declaration. I'm just looking at it. What do you have to say about that?

MR. BILLINGS: So he says that he knew that Mr. Brooks had a relationship with Niantic and he said that he didn't tell Mr. Logothetis. My response is: So what? Mr. Andueza had the authority under the operating agreement. Mr. Logothetis is not an officer, a director, manager or have any position with the companies involved. He's way up several holding companies away from any of this. He has no rights and he has no -- his authority is not only not needed, it has no legal effect because the operating agreements provide that Andueza and Diaz both have authority to bind the company by their signature conclusively, and both did multiple times.

THE COURT: Okay.

MR. BILLINGS: I don't think makes a lick of difference.

THE COURT: Let me hear from your co-counsel.

MR. BILLINGS: Thank you.

MR. LaFROMBOIS: Thank you, your Honor, I will briefly comment on Mr. Andueza's declaration. From our viewpoint, the declaration of Mr. Andueza makes no difference. He does acknowledge that he was aware he had the authority to act as Mr. Billings described. And the bottom line is it just doesn't make any difference because it's just another aspect of the

conclusory, broad allegations that have been part of this matter since day one.

I would focus on the supply agreement and make a couple of comments to that agreement. The Court asked questions about what is the appropriate remedy if there was a breach of that agreement. That agreement has an important and somewhat unique clause in that there's a duty on each side to continue to perform until such time as certain notice provisions and time frames have passed to the lender who is secured by that agreement, which is BMO Harris.

In this case we really have a form of self-help and just attempting to not perform under the agreement. This type of take-or-pay contract is essential to the financing of these types of transactions wherein a party requires a certain supply of a product, in this case very specialized pellets to produce electricity that will be sold to the primary buyer. Then, of course, the proceeds from the electricity is needed to pay for the pellet plant. So it's a virtuous cycle which the lender looks for their repayment from both parties because they're a lender to both parties. It's a pretty easy contract to understand. So for one party just to unilaterally breach the contract is a significant detriment to the other party, and has been to Convergen. It doesn't take much to imagine that if your primary source of revenue is suddenly gone without any true legal proceeding coming before the cessation of activity

under the contract, that's a very material harm.

So I mention that point that there is a very specific process in the contract to deal with the issues of a dispute between the parties, and I would point out both the supply agreement arbitration clause and the purchase agreement arbitration clause are very broad. They expressly call out issues of arbitrability would fall within that clause. There's been no allegation that fraud goes to the -- except in a general sense, goes to the arbitration clause.

I think when you read *Prima Paint* and *Buckeye* together and several of the other cases that dealt with this issue that it's clear that wherever you have an express broad contract that calls for arbitration and expressly calls for arbitrability, there's no question that those issues should be left to the arbitrator.

The other issue that I point out on these fraud cases is the reading of the warranties and representations within the acquisition agreement is helpful to understand what the parties were intending. And the warranties and reps are usually heavily negotiated in contracts like this, and I assume there's no reason why these wouldn't have been.

And the time frame is very interesting here. You have a January 31 partial close, and by the plaintiff's own admission, a February 1 discovery, they allege. Then as Mr. Billings points out, 18 days later they sign an agreement

which reaffirms the terms of the acquisition agreement, and during those 18 days, by their own admission, knew about these circumstances of which they now complain.

And so it's really hard to understand, or I would think from a plaintiffs' point of view, to argue that they weren't aware, that they didn't very knowingly enter into an agreement that didn't even request a warrant deed from the other side about who was purchasing. They could have asked for one, certainly, but it's not there.

So just to argue there was an omission, what was the duty of that? Where does the duty arise to make that omission under the circumstances? So I think it adds color and insight into these allegations of fraud is that they're very broad, but it's interesting that in all the pleading that there's not one time that they point to a warrant and rep that was violated.

THE COURT: Okay.

MR. LaFROMBOIS: And I think that's very telling.

THE COURT: Okay. I think I have enough.

Is there anything further from you, Mr. Stolper?

MR. STOLPER: Just very briefly, your Honor, just a couple of points in fact in the record for you. The Brooks -- I mentioned I have given you the name Logothetis. Mr. Brooks said in his declaration to you, paragraph 25, that's document 152, he said all decisions flow through Logothetis. That's in his own declaration.

In Andueza's declaration he said that no one at the company knew of the conflict, that no one knew that Brooks was self-dealing or about Hansen and Mikkelson. So very early on in the case, the fraud is there. It's proven. It's about knowledge and about keeping things secret. It's in their declarations in the early onset of the case.

So the issue about whether to arbitrate formation or not, we have a conflict over what Andueza did or didn't do. If he weren't compromised, he had the authority because of his position. But the point is he's compromised. And it's not just us saying it, Brooks says in his declaration to you that this whole scheme was Andueza, not me. That's what he said in his declaration. So they can't have it both ways. They can't point the finger at Andueza and say any wrongdoing is this guy's fault, but yet he has the authority to sign the contracts.

THE COURT: I don't think that they are saying there's wrongdoing.

Anything further that you've got?

MR. STOLPER: You had asked counsel if there was evidence of the conspiracy, and we had put in -- among other things, we put in the private email chat not done through the Libra emails but privately through Hot Mail and Gmail accounts between Andueza and Brooks about sources and uses of the monies that would be put together. So I was just answering the

question that you posed to counsel and thinking about the answer and pointing that out to you. That's it.

THE COURT: Okay. All right. So I'm going to reserve decision and you should get an opinion from me in the next couple of days.

Thank you all very much, we're adjourned.

MR. STOLPER: Thank you.

(Adjourned)